INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
States and regulations involved	2
Statement	4
Argument	7
Conclusion	10

CITATIONS

Cases:	
Manhattan-Bronx Postal Union v. *Gronouski*, 350 F. 2d 451, certiorari denied, 382 U.S. 978	10
National Association of Internal Revenue Employees v. *Dillon*, 356 F. 2d 811	10
Semaan v. *Mumford*, 335 F. 2d 704	9
Statutes and regulations:	
Freedom of Information Act:	
5 U.S.C. 552(a)	8
5 U.S.C. 552(b)	8
Tobacco Inspection Act of 1935, 7 U.S.C. 511m	2, 9
28 U.S.C. 1254(1)	1
Administrative Regulations of the Department of Agriculture, Chapter 351, Subchapter 2(2)	4, 8
The Federal Personnel Manual of the United States Civil Service Commission:	
FPM Supplement 990–2 Book 531, Subchapter S2–7(e)	3
FPM—Chapter 715, Subchapter 3–3	4, 8
Miscellaneous:	
Employee-Management Cooperation Agreement, ¶4.2	9
Executive Order 10988	10

In the Supreme Court of the United States

~~ORVILLE FREEMAN~~

No. 805

ROBERT L. HICKS, PETITIONER

v.

ORVILLE FREEMAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. 1a–10a) is reported at 273 F. Supp. 334. The opinion of the court of appeals (Pet. App. 11a–15a) is reported at 397 F. 2d 193.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1968. A timely petition for rehearing was denied on September 6, 1968. The petition for a writ of certiorari was filed on December 5, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the reduction-in-force procedures, applicable to the separation of Federal employees from their jobs, apply to the annual furloughing of seasonally employed tobacco graders.

2. Whether the Secretary of Agriculture was authorized by the Tobacco Inspection Act of 1935 to reexamine the method of compensating seasonal tobacco graders and to determine that the graders are to be compensated by the government only for those periods in which they actually work.

STATUTES AND REGULATIONS INVOLVED

7 U.S.C. 511m. Regulation; hearings; employees; expenditures; appropriations.

> The Secretary is authorized to make such rules and regulations and hold such hearings as he may deem necessary to effectuate the purposes of this chapter and may cooperate with any other Department or agency of the Government; any State, territory, district, or possession, or department, agency, or political subdivision thereof; purchasing and consuming organizations, boards of trade, chambers of commerce, or other associations of business men or trade organizations; or any person, whether operating in one or more jurisdictions in carrying on the work herein authorized; and he shall have the power to appoint, suspend, remove, and fix the compensation of all officers, employees, and licensees not in conflict with existing law. The Secretary is authorized to make such expenditures for rent outside of the District of Columbia, printing, binding, telegrams, telephones, books of reference, publications, furni-

ture, stationery, office and laboratory equipment, travel, tobacco for use in preparing and demonstrating standards, and other supplies and expenses, including reporting services, as shall be necessary to the administration of this chapter in the District of Columbia and elsewhere, and as may be appropriated for by Congress; and there is authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, such sums as may be necessary for administering this chapter.

The Federal Personnel Manual of the United States Civil Service Commission provides as follows:

> FPM Supplement 990–2, Book 531, Subchapter S2–7(e). Pay for intermittent employment.
>
> There are no provisions in the Classification Act of 1949, as amended, nor in the Federal Employees' Pay Act of 1945, as amended, authorizing a full day's pay for services *less* than the length of the normal workday; nor is payment of compensation authorized for any number of hours less than those actually worked. Accordingly, it follows that, generally, the compensation of employees appointed on a when-actually-employed basis is determined in the same manner as that of full-time employees. Exceptions to the general rule occur in those instances when W.A.E. employees have no administratively established workweeks and perform services in excess of 40 hours per week for one or both of the weeks in the biweekly pay period. Such employees are entitled to *straight-time* compensation for all hours worked irrespective of whether services be performed in excess of 40 hours per week (34 Comp. Gen. 471. [Emphasis in the original.]

FPM—Chapter 715, Subchapter 3–3. Other Reasons for Nondisciplinary Actions.

Lack of funds or lack of work.

* * * * *

d. Intermittent, seasonal, and part-time employees.

Furlough does not apply to employees serving on an intermittent, seasonal, or part-time basis when the administrative action to relieve them from duty conforms to the conditions of employment established in their appointments.

The Administrative Regulations of the Department of Agriculture provide in pertinent part:

Chapter 351—Reduction in Force

* * * * *

Subchapter 2—General Provisions

* * * * *

(2) Furloughs of seasonal employees.

Furloughs in excess of 30 days may be made without regard to reduction-in-force procedure for employees who were appointed on a seasonal basis when such seasonal limitation has been recorded on the personnel notification.

STATEMENT

1. The petitioner was appointed by the United States Department of Agriculture as a tobacco grader or inspector in August 1955 (Pet. App. 2a). His duties involved the grading of tobacco offered for sale at auction. In accordance with the then-existing practice, through 1965 petitioner was kept in pay status for approximately eight months each year although "he actually worked on an average only five months

out of the eight months for which he was paid" (Pet. App. 3a).

In the interim, a Departmental audit of the Tobacco Division of the Consumer Marketing Service revealed that 38 percent of the Division's annual salary expenditure for tobacco graders was being spent in payment for time not actually worked by the graders (Tr. 204–205).[1] The Department accordingly determined that all inspectors hired after 1963 were to be advised each season as to the actual prospective work period and that their pay period would more closely conform to the actual time worked (Tr. 206). Thereafter, in 1965, the personal attention of the Secretary of Agriculture was directed to the practice of paying the tobacco graders eight months' pay for approximately five months' work (Tr. 206). After another investigation—revealing that the men were being paid even when the markets were closed and there was no work for them to do—the Secretary decided to terminate the practice (Tr. 207–208). The Department then determined to give the men notice that beginning with the July 1966 season the employment period would be changed to correspond with the actual working period (Tr. 210).

A meeting was held on October 28, 1965 (App. 166–168), between Department officials and the Executive Committee of the Federal Tobacco Inspectors Mutual Association, the union representing the inspectors. Three days later, on November 1, 1965, the Director

[1] "Tr." refers to the transcript of the district court proceedings on file with this Court. "App." refers to the Appendix to the brief which petitioner filed in the court of appeals, and which has been transmitted to this Court.

of the Tobacco Division put the new method of compensation into effect as of the next marketing season beginning in July 1966 (App. 172–173). Before the marketing season began, all personnel were questioned as to whether they wanted to return under the revised employment conditions (App. 136).

Petitioner returned to work on July 20, 1966 (App. 68). His work terminated on December 12, 1966 (App. 68). He was accordingly paid for the five months (10 pay periods) that he actually worked, instead of the eight months' pay (17½ pay periods) he had been receiving in previous years (App. 44, Tr. 234–236).[2]

2. Petitioner brought this mandamus proceeding to compel the Secretary of Agriculture to pay him eight months' wages for five months' work, as had been the practice prior to the change in policy in 1965 (App. 1–9, 14–15). After trial, the district court rejected all of the petitioner's contentions and entered judgment in favor of the Secretary (Pet. App. 1a–10a).

The court of appeals affirmed, ruling that: (1) no employment contract had been established that would obligate the Secretary to continue the practice of paying petitioner eight months' salary per year for five months' work, just as there was no contract binding petitioner to work for the Department of Agriculture more than one season; (2) the elements of an estoppel had not been established; (3) the Depart-

[2] In addition to his earnings from the Agriculture Department for 1966, petitioner estimated that his private real estate business grossed approximately "forty-two hundred dollars" in 1966 (Tr. 57).

ment did not violate the Employee-Management Cooperation Agreement, but rather acted in accordance with that Agreement by consulting with the union on this matter; (4) the Secretary was not required to follow reduction-in-force procedures in determining which inspectors were to be given further assignments on the burley-tobacco market, since federal regulations make a specific exception for seasonal employees (Pet. App. 11a–15a).

ARGUMENT

1. Contrary to petitioner's contention (Pet. 8–10), in determining which inspectors were to be given further assignments on the burley-tobacco market, the Secretary was not required to follow the detailed "reduction-in-force" procedures applicable to the separation of federal employees from their jobs.[3] Both the regulations of the Department of Agriculture and the Federal Personnel Manual of the Civil Service Commission, interpreting the Commission's regulations, clearly state that the reduction-in-force procedures are not applicable to seasonal employees such as petitioner. The Federal Personnel Manual says that

[3] Contrary to petitioner's suggestion (Pet. 10), he was not injured by the failure of the Department of Agriculture to establish a retention register. The Department selected 33 men for additional work in grading burley tobacco (Tr. 223). There were 83 veterans in the GS–9 level with more years of government service than petitioner; they would thus have been ahead of him had a reduction-in-force retention roster been established (Tr. 224, 225). Therefore, even if "reduction-in-force" procedures had been followed in the selection of graders in the burley market, petitioner would not have been selected.

"Furlough does not apply to employees serving on * * * seasonal, or part-time basis when the administrative action to relieve them from duty conforms to the conditions of employment established in their appointments." FPM Chapter 715, Subchapter 3–3d. And the Department of Agriculture Regulations specifically provide (Chapter 351, Subchapter 2, (2)):

> Furloughs in excess of 30 days may be made without regard to reduction-in-force procedure for employees who were appointed on a seasonal basis when such seasonal limitation has been recorded in the personnel notification.

Petitioner stresses (Pet. 11) that the Civil Service Commission Federal Personnel Manual and the Department of Agriculture Regulations are not published in the Federal Register, and apparently relies upon the publication requirements set forth in the Freedom of Information Act, 5 U.S.C. 552(a). But, as the court of appeals pointed out, these requirements are expressly inapplicable to regulations, such as those here, which relate "solely to * * * internal personnel rules and practices" (5 U.S.C. 552(b)).

2. Petitioner further asserts (Pet. 13–15) that the government was contractually obligated indefinitely to provide him with "'continuing' future employment" for periods in excess of his actual seasonal work periods. But the courts below correctly ruled that no such employment contract has been established. Nor is there any basis upon which the Secretary of Agriculture could be deemed estopped, as petitioner con-

tends (Pet. 14–15), from exercising his authority to adjust the pay period of seasonal tobacco graders to reflect the actual time worked.[4]

3. Petitioner's contention (Pet. 16) that the Secretary's action—in conforming petitioner's pay period to the time actually worked—was based on a legal error, rather than on an exercise of discretion, is baseless. The Secretary was plainly exercising the discretion granted to him under the Tobacco Inspection Act of 1935, which expressly provides that the Secretary "shall have the power to appoint, * * * and fix the compensation of all officers, employees, * * * not in conflict with existing law." 7 U.S.C. 511m.

4. Finally, petitioner contends (Pet. 16–18) that the Secretary of Agriculture's change of the compensation period violated collective bargaining rights established by the Employee-Management Cooperation Agreement. But, as the court below noted (Pet. App. 14a), the Employee-Management Cooperation Agreement expressly and specifically provides (¶4.2, App. 160):

> Rates of pay or other conditions of employment specifically covered by Federal statute,

[4] Contrary to petitioner's assertion, there is no conflict between the decision below and *Semaan* v. *Mumford*, 335 F. 2d 704 (C.A.D.C.), in which it was held that summary judgment had inappropriately been applied where there was an issue of fact as to whether a discharged employee was entitled to the administrative procedural safeguards governing the dismissal of "permanent" employees.

Executive Orders, rules and regulations are not subject to negotiation.[5]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1969.

[5] Executive Order 10988 (discussed in Pet. 16–18), upon which the Agreement is based (App. 154), creates no judicially enforceable rights. *Manhattan-Bronx Postal Union* v. *Gronouski*, 350 F. 2d 451 (C.A.D.C.), certiorari denied, 382 U.S. 978; *National Assoc. of Revenue Employees* v. *Dillon*, 356 F. 2d 811 (C.A.DC.).

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